

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Time Warner Cable Inc., and Time Warner)	
Entertainment-Advance/Newhouse Partnership)	CSR 7377-E
)	CSR 7493-E
3 Petitions for Determination of Effective)	CSR 7496-E
Competition in 52 Communities in the State of)	
New York and the Commonwealth of)	
Pennsylvania)	

MEMORANDUM OPINION AND ORDER

Adopted: December 16, 2008

Released: December 17, 2008

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc., and Time Warner Entertainment-Advance/Newhouse Partnership, hereinafter referred to as “Petitioner,” has filed with the Commission petitions pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(1) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in the 52 communities listed on Attachment A and hereinafter referred to as “Communities.”¹ Petitioner alleges that its cable systems serving the communities listed on Attachment B and hereinafter referred to as the Attachment B Communities, as well as the communities listed on Attachment C and hereinafter referred to as the Attachment C Communities, are subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”)² and the Commission’s implementing rules,³ and are therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and Dish Network (“Dish”).

2. Petitioner also claims to be subject to effective competition because of the DBS providers in the Communities listed on Attachment D and hereinafter referred to as the Attachment D Communities, but has not furnished the data with which we can adjudicate those claims. Petitioner has, however, furnished data with which we can determine whether Petitioner is exempt from cable rate regulation in the Attachment D Communities because it serves fewer than 30 percent of the households there. The

¹ The petitions also seek such a determination for 20 additional communities. By letters dated November 17, 2008, Petitioner requested permission to withdraw them from our consideration. The Communities are, in CSR 7377-E, Allegany (Village) NY0009; Andover (Village) NY0014; Belmont (Village) NY0016; Cattaraugus (Village) NY0860; Cuba (Village) NY0118; East Randolph (Village) NY1153; Ellicottville (Town) NY0857; Ellicottville (Village) NY0856; Franklinville (Village) NY0864; Portville (Village) NY0366; Randolph (Village) NY1151; and Wellsville (Village) NY0019; in CSR 7493-E, Nichols (Town) NY1074; Athens (Borough) PA0579; and South Waverly (Borough) PA0594; and, in CSR 7496-E, Bemus Point (Village) NY0908; Cassadaga (Village) NY0710; Falconer (Village) NY0157; Panama (Village) NY1564; and Sinclairville (Village) NY1244. We grant Petitioner’s request and do not consider these 20 communities further herein.

² See 47 U.S.C. § 543(1).

³ 47 C.F.R. § 76.905(b)(2) and 47 C.F.R. § 76.905(b)(1).

petitions are unopposed.

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ For the reasons set forth below, we grant the petitions as to all of the Attachment B Communities and the Attachment D Communities, based on our finding that Petitioner is subject to effective competition in them; and we deny the petitions as to the Attachment C Communities.

II. DISCUSSION

A. The Competing Provider Test

4. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area;⁷ this test is otherwise referred to as the "competing provider" test.

5. The first prong of this test has three elements: the franchise area must be "served by" at least two unaffiliated MVPDs who offer "comparable programming" to at least "50 percent" of the households in the franchise area.⁸

6. Turning to the first prong of this test, it is undisputed that the Attachment B Communities and the Attachment C Communities are "served by" both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered "served by" an MVPD if that MVPD's service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service's availability.⁹ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹⁰ We further find that Petitioner has provided sufficient references to DBS promotions in media that serve the Attachment B Communities and the Attachment C Communities to support its assertion that potential customers in the Attachment B Communities and the Attachment C Communities are reasonably aware that they may purchase the service of these MVPD providers.¹¹ The "comparable programming" element is met if a competing MVPD provider offers at least 12 channels of

⁴ 47 C.F.R. § 76.906.

⁵ See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

⁶ See 47 C.F.R. §§ 76.906 & 907.

⁷ 47 U.S.C. § 543(l)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

⁸ 47 C.F.R. § 76.905(b)(2)(i).

⁹ See, e.g., Petition in CSR 7377-E at 3-5.

¹⁰ Mediacom Illinois LLC et al., Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan, 21 FCC Rcd 1175 (2006).

¹¹ 47 C.F.R. § 76.905(e)(2); see also Petition in CSR 7493-E at 4 n.12.

video programming, including at least one channel of nonbroadcast service programming¹² and is supported in this petition with citations to the channel lineups for both DIRECTV and Dish.¹³ Also undisputed is Petitioner's assertion that both DIRECTV and Dish offer service to at least "50 percent" of the households in the Attachment B Communities and the Attachment C Communities because of their national satellite footprint.¹⁴ Accordingly, we find that the first prong of the competing provider test is satisfied as to both the Attachment B Communities and the Attachment C Communities.

7. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in most of the Attachment B Communities and the Attachment C Communities.¹⁵ Petitioner sought to determine the competing provider penetration in these Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers attributable to the DBS providers within these Communities on a five-digit zip code basis.¹⁶

8. In the remainder of the Attachment B Communities and the Attachment C Communities, the largest MVPD is unable to be identified because Petitioner's subscribership is over 15 percent and so is the DBS providers', but Petitioner's is less than the DBS providers'.¹⁷ It is possible that the largest MVPD there is Petitioner or either of the two DBS providers. In such circumstances, nevertheless, it is clear that the second prong of the competing provider test is satisfied. If Petitioner is the largest MVPD in a Community, then the combined subscribership of the other MVPDs (the DBS providers) is greater than 15 percent. Or, if one of the DBS providers is the largest MVPD in the Community, then the combined subscribership of the other MVPDs (Petitioner and the other DBS provider) is greater than 15 percent. Petitioner's data shows that both these determinations can be made for all the Attachment B Communities and the Attachment C Communities.¹⁸

9. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁹ as reflected in Attachment B and Attachment C, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in both the Attachment B and Attachment C Communities. Therefore, based on the data in the Petitions, the second prong of the competing provider test is satisfied for each of the Attachment B and Attachment C Communities.

10. Attachment C, however, lists two Communities in which Petitioner's data show that the combined subscriberships of Petitioner and the DBS Providers exceed 100 percent of the households. This data is obviously inaccurate and unreliable. It may be that the excessive subscribership totals result from the combined application of very small populations (in both the Attachment C Communities, there are only a few hundred households) and five-digit zip codes that cover large areas and many households

¹² See 47 C.F.R. § 76.905(g). See also, e.g., Petition in CSR 7493-E at 5-6.

¹³ See, e.g., Petition in CSR 7496-E at 6.

¹⁴ See, e.g., Petition in CSR 7377-E at 3.

¹⁵ See, e.g., Petition in CSR 7493-E at 7.

¹⁶ See, e.g., Petition in CSR 7496-E at 9 n.26.

¹⁷ These Communities are, in CSR 7377-E, Allegany (Town), Cuba (Town), Eldred (Township), Hinsdale, Randolph (Town), and Wellsville (Town); in CSR 7493-E, Barton (Town); and, in CSR 7496-E, Cherry Creek (Village), North Harmony (Town), South Dayton (Village), and Stockton (Town).

¹⁸ See, e.g., Petition in CSR 7496-E at Exhs. A, E & F.

¹⁹ See, e.g., Petition in CSR 7377-E at 8 n.26.

outside the franchise areas. Whatever the reason, we cannot disregard these inaccuracies, which Petitioner should have corrected before filing or noticed and brought to our attention, because they undermine the reliability of the five-digit zip code data in these instances. We deny the petitions as to the two Attachment C Communities.

11. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and reliable for purposes of concluding that Petitioner is subject to effective competition as to the Attachment B Communities. Accordingly, we grant the petitions as to the Attachment B Communities.

B. The Low Penetration Test

12. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if the Petitioner serves fewer than 30 percent of the households in the franchise area; this test is otherwise referred to as the “low penetration” test.²⁰

13. Petitioner alleges that it is subject to competing provider effective competition in the Attachment D Communities, and the first prong of that kind of effective competition is satisfied in them. Petitioner, however, has submitted incomplete or flawed evidence about the second prong. In two Attachment D Communities, French Creek, New York, and Wayne, Pennsylvania, Petitioner supplied no data about DBS subscribership. In the other Attachment D Communities, Petitioner’s subscribership is very small and, if the subscribership of one of the DBS providers is also very small, then the subscribership of the MVPDs other than the largest MVPD would not exceed 15 percent of the households in the franchise area.²¹ Thus, Petitioner cannot satisfy the second prong of the competing provider effective competition test in the Attachment D Communities.

14. In all the Attachment D Communities, however, Petitioner’s subscribership is under 30 percent.²² Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment D, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Communities listed on Attachment D. Therefore, the low penetration test is satisfied in those Communities.

²⁰ 47 U.S.C. § 543(l)(1)(A).

²¹ See, e.g., Petition in CSR 7493-E at 8.

²² See, e.g., Petition in CSR 7496-E at 8-9.

III. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that Petitioner's request that the 20 communities listed in footnote 1 be withdrawn from consideration in this proceeding **IS GRANTED**.

16. **IT IS FURTHER ORDERED** that the petitions for a determination of effective competition filed in the captioned proceeding by Time Warner Cable Inc., and Time Warner Entertainment-Advance/Newhouse Partnership **ARE GRANTED** as to the Communities listed in Attachment B and Attachment D and **ARE DENIED** as to the Communities listed in Attachment C.

17. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment B and Attachment D **IS REVOKED**.

18. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²³

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division, Media Bureau

²³ 47 C.F.R. § 0.283.

ATTACHMENT A

ALL COMMUNITIES

CSR 7377-E, CSR 7493-E, CSR 7496-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC., AND TIME WARNER
ENTERTAINMENT-ADVANCE/NEWHOUSE PARTNERSHIP

Communities	CUID(S)
CSR 7377-E	
Allegany (Town)	NY0010
Amity	NY0470
Andover (Town)	NY0015
Coldspring	NY1596
Conewango	NY1158
Cuba (Town)	NY0913
Franklinville (Town)	NY0865
Great Valley	NY1523
Hinsdale	NY1025
Ischua	NY1524
Mansfield	NY1154
New Albion	NY1159
Olean (City)	NY0012
Olean (Town)	NY0011
Portville (Town)	NY0367
Randolph (Town)	NY1152
Scio	NY0017
Wellsville (Town)	NY0018
Willing	NY0020
Ceres	PA3273
Eldred (Borough)	PA0034
Eldred (Township)	PA1531
CSR 7493-E	
Barton (Town)	NY0269
Chemung (Town)	NY1076
Nichols (Village)	NY1075
Waverly (Village)	NY0270
Athens (Township)	PA0578
Litchfield (Township)	PA3177
Sayre (Borough)	PA0593
Ulster (Township)	PA0690
CSR 7496-E	
Brocton (Village)	NY1071
Busti (Town)	NY0383
Carroll (Town)	NY1125
Cherry Creek (Village)	NY1695
Clymer (Town)	NY1671
Ellery (Town)	NY0605
Ellicott (Town)	NY0431
Ellington (Town)	NY1705
Fredonia (Village)	NY0618
French Creek (Town)	NY1703
Gerry (Town)	NY1201

Communities CUID(S)**CSR 7496-E (continued)**

Harmony (Town)	NY1565
Mina (Town)	NY1672
North Harmony	NY1202
Poland (Town)	NY0561
Pomfret (Town)	NY0619
Portland (Town)	NY1384
South Dayton (Village)	NY1526
Stockton (Town)	NY0711
Villanova (Town)	NY1696
Wolcott (Town)	NY1126
Wayne (Township)	PA0220

ATTACHMENT B

“COMPETING PROVIDER” COMMUNITIES – GRANTED**CSR 7377-E, CSR 7493-E, CSR 7496-E****COMMUNITIES SERVED BY TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE
PARTNERSHIP AND TIME WARNER CABLE INC.**

Communities	CUID(S)	CPR*	2000 Census Households	Estimated DBS Subscribers+
CSR 7377-E				
Allegany (Town)	NY0010	27.22%	2599	707
Amity	NY0470	46.69%	885	413
Cuba (Town)	NY0913	48.59%	1336	649
Hinsdale	NY1025	31.28%	861	269
Olean (City)	NY0012	22.28%	6446	1436
Olean (Town)	NY0011	22.28%	827	184
Portville (Town)	NY0367	28.12%	1545	435
Randolph (Town)	NY1152	48.75%	1007	491
Scio	NY0017	35.56%	729	259
Wellsville (Town)	NY0018	30.17%	3192	963
Willing	NY0020	33.79%	538	182
Eldred (Township)	PA1531	52.67%	686	361
CSR 7493-E				
Barton (Town)	NY0269	25.34%	3568	904
Chemung (Town)	NY1076	16.45%	969	159
Waverly (Village)	NY0270	16.66%	1877	313
Athens (Township)	PA0578	23.35%	2002	468
Sayre (Borough)	PA0593	15.24%	2529	385
CSR 7496-E				
Brocton (Village)	NY1071	22.68%	623	141
Busti (Town)	NY0383	15.65%	3210	502
Carroll (Town)	NY1125	16.34%	1364	223
Cherry Creek (Village)	NY1695	49.02%	198	97
Clymer (Town)	NY1671	38.97%	502	196
Ellery (Town)	NY0605	17.10%	1852	317
Ellicott (Town)	NY0431	15.08%	3818	576
Fredonia (Village)	NY0618	17.85%	3641	650
Gerry (Town)	NY1201	17.23%	661	114
Mina (Town)	NY1672	36.92%	456	168
North Harmony	NY1202	33.89%	927	314
Poland (Town)	NY0561	36.18%	940	340
South Dayton (Village)	NY1526	48.85%	248	121
Stockton (Town)	NY0711	25.45%	859	219
Wolcott (Town)	NY1126	33.84%	1742	589

* CPR = DBS penetration or subscribership

+ See Petition (numbers of DBS subscribers are rounded off)

ATTACHMENT C

“COMPETING PROVIDER” COMMUNITIES – DENIED

CSR 7377-E, CSR 7493-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	Time-Warner Subscribership*	DBS Subscribership*	2000 Census Households	Estimated DBS Subscribers*
CSR 7377-E Eldred (Borough)	PA0034	77.07%	45.14%	362	163
CSR 7493-E Nichols (Village)	NY1075	77.46%	29.18%	213	62

* See Petition (numbers of DBS subscribers are rounded off)

ATTACHMENT D

“LOW PENETRATION” COMMUNITIES – GRANTED**CSR 7377-E, CSR 7493-E, CSR 7496-E****COMMUNITIES SERVED BY TIME WARNER ENTERTAINMENT-ADVANCE/NEWHOUSE
PARTNERSHIP**

Community	CUID	Franchise Area Households	Cable Subscribers	Penetration Percentage
CSR 7377-E				
Andover (Town)	NY0015	742	48	6.47%
Coldspring	NY1596	278	4	1.44%
Conewango	NY1158	509	9	1.77%
Franklinville (Town)	NY0865	1205	92	7.63%
Great Valley	NY1523	843	86	10.20%
Ischua	NY1524	345	10	2.90%
Mansfield	NY1154	305	18	5.90%
New Albion	NY1159	808	4	.50%
Ceres	PA3273	381	13	3.41%
CSR 7493-E				
Litchfield (Township)	PA3177	501	27	5.39%
Ulster (Township)	PA0690	512	67	13.09%
CSR 7496-E				
Ellington (Town)	NY1705	568	84	14.79%
French Creek (Town)	NY1703	332	48	14.46%
Harmony (Town)	NY1565	837	111	13.26%
Pomfret (Town)	NY0619	5105	580	11.36%
Portland (Town)	NY1384	1655	47	2.84%
Villanova (Town)	NY1696	415	23	5.54%
Wayne (Township)	PA0220	642	12	1.87%